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The Perils of Globalization and the World Trading System

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THE PERILS OF GLOBALIZATION AND THE WORLD TRADING SYSTEM

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INTRODUCTION

The post-World War II world trading system is now more than fifty years old, and not surprisingly, it has evolved through a number of different stages of development and survived a series of perils. Recently, however, the perils seem even greater than before. The failure of the Seattle Ministerial Meeting of November-December 1999 focused the attention of the international community, almost like a prospective execution focusing the attention of the targeted person. A number of different factors have contributed to this perilous situation, and in this brief Essay, I want to look particularly at some of the institutional characteristics of the World Trade Organization[1] ("WTO"), which may be contributing to, or inhibiting escape from, the "perils." I will do this in four parts.

Part I will be a brief reminder of the policy objectives and implications of the international economic system. Part II will overview the world trading system's need for a cooperative international mechanism or institution. Part III will examine the characteristics needed for a successful institution of this type, which might be the WTO. Part IV will explore some problems connected with the current situation related to the needed characteristics.

I. *THE POLICY OBJECTIVES AND THEIR IMPLICATIONS*

When analyzing the successes and failures of the current world trading system, it is useful to begin by recalling the assumptions of the policymakers that form the foundation for this

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* This Essay develops some thinking expressed in a lecture and essay. *See* John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: The Seven 'Mantras' Revisited*, PSIO OCCASIONAL PAPER, WTO SERIES No. 02 (2000); John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, J. INT'L ECON. L. 1, 1998, at 329-51; John H. Jackson, *International Economic Law in Times that are Interesting*, J. INT'L ECON. L. 3, Mar. 2000, at 3-14.

1. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

system.[2] There were two main objectives sought at the Bretton Woods Conference in 1944 and at the subsequent conferences that led to the negotiations of the General Agreement on Tariffs and Trade[3] ("GATT") and the International Trade Organization ("ITO"). The first objective, the more important one at that time, sometimes overlooked, was the prevention of another war. The idea was to build institutions that would avoid the problems that occurred in the inter-war period, which were blamed for leading to the Second World War. Arguably, this post-World War II vision of the statesmen establishing a world trading system has proven successful, in that the world has since avoided a global war.

The second objective was the economic betterment of the whole world. This is based on general policies about economics and the market structure of economies. The basic idea is that increasing the amount of resources for each individual (or family) is the best way to allow that individual to follow his or her choices, lifestyle, and goals in life. This objective is based on the economics of comparative advantage and the economics of competition. The economists themselves have articulated certain challenges to the concepts of comparative advantage. However, even those who reject some or all of the concepts of comparative advantage may accept the advantages of competition: namely, a higher degree of efficiency and productivity that contribute to world economic betterment. We should note that competition occurs between producers or service providers *within* single countries or *across borders.*

Today, the world trading system is motivated by a third objective: managing economic interdependence, what some people call "globalization." Natural barriers to cross-border economic activities have declined dramatically due to the events of the last several decades. Half a century ago, countries were motivated to reduce border barriers and other barriers to trade.

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2. *See also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2d ed. 1997). A bibliography of principal publications of this author may be found at the Georgetown University Law Center web site. *See also* a compilation of a number of relevant articles by this author at JOHN H. JACKSON, THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (2000).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

However, border barriers may not have been as vital or significant at that time, since there were other, more natural barriers to trade. During these last decades, those natural trade barriers have declined in significance. First, transportation costs and time have been significantly reduced. As a result, farmers can ship fresh produce to locations halfway around the world. Second, communication has improved, thereby reducing what might have been a natural trade barrier. Third, transaction costs and time have been significantly reduced in the last five to ten years.

These changes challenge us, and we can reevaluate the advantages that we hope to gain from comparative advantage and competition. The reduction of natural trade barriers should enhance these advantages. Nevertheless, we know, and the economists instruct us, that there are both winners and losers in this process. Decades ago, the basic concept was that the advantages create a rising tide that lifts all boats. We now realize that not *all* boats are lifted, for one reason or another. This results in a situation in which people experience fear and anxiety about whether they will be able to retain their living standard and lifestyle. Even people who have profited handsomely by these new economic developments have felt this in some cases. Poignant is the person about fifty-five or sixty years of age who loses a job and is in a position where it is very difficult to find another job within a reasonable period of time, and yet is not then able to retire. These are some of the facets that contribute to the creation of so-called "globalphobia," which has been written about and was manifested in Seattle in late 1999.

II. *THE WORLD TRADING SYSTEM'S NEED FOR AN INTERNATIONAL ORGANIZATION*

Looking at the landscape of the world trading system, what are the implications of these circumstances? As the countries of the world become increasingly interdependent, nation-state governments cannot regulate effectively on many subjects. As a result, national governments cannot meet the expectations of their constituents and cannot deliver upon their promises to their constituents. This imposes a considerable amount of tension on governments and makes governing much more difficult. Within this context, there is a worry that there will be a "race to the bottom" and that there will be a tendency for governments to

redress their insecurity by using barriers of one type or another. For example, it leads to what some economists analyze as the prisoners' dilemma: when one country raises barriers, another is likely to do so, and soon all countries will be hurt. What is the solution?

The solution is cooperative institutions at the international level. These institutions should be based on rule orientation, as opposed to power orientation. These rules should be well formulated and effective. In other words, they should cause certain kinds of behavior and inhibit other kinds of behavior.

This raises the issue of sovereignty. We are seeing that the rule-oriented measures that emerged from the Uruguay Round[4] and earlier rounds of multilateral trade negotiations deeply affect national regulation internally, not merely at the border. As a result, some people in the United States have argued that we should reverse course and take the WTO back to the time when it was responsible only for border measures, thereby limiting its ability to affect national regulation internally. This is folly, because such time never existed. It was always recognized that there were measures in GATT that would have effects behind the border. In particular, GATT Article III, paragraph 4, which deals with internal regulations and national treatment,[5] always has had enormous implications on sovereignty and sovereign decisions relating to internal regulations.

Another part of this policy landscape is the relationship of institutions to markets. This Essay is based in part on the underlying assumption of market economics, an assumption that can be challenged. But following the logic of market economic thinking, we realize that during the last several decades economists have become much more interested in the *institutions* that underpin the markets and make the markets work. These institutions are vital. The markets themselves will not work without an appropriate institutional framework, as implied by the writings of Nobel Prize winners Douglass North and Ronald Coase.[6]

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4. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994).

5. GATT art. III.

6. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990); RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988); *see also* JAN TUMLIR, PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES (1985).

Perhaps what we saw in Seattle last December was in essence a challenge to the existing institutional structure. Many commentators have discussed the causes of the failure of Seattle at great length and have come up with a list of a dozen such causes.[7] However, my focus is on the institutional side, on what I call the "constitution" of the world trading system.[8] I am using the term "constitution" in the broad view, as it is used in the United Kingdom, representing this institutional structure as a whole, as the world trading system actually operates, including informal mechanisms and "practice."

People have asked, "Is Seattle a real crisis?" After all, GATT and the WTO have been through various times like this, such as the 1982 ministerial, the Montreal mid-term ministerial in the Uruguay Round in 1988, and the Brussels impasse in 1990. Thus, it may be business as usual. In my view, however, Seattle is at least a *mini-crisis* that may serve as a wake-up call for some of the problems that we can see imbedded in the institutional structure.

What did the crisis or mini-crisis mean? I do not think that it will lead to a collapse of the WTO. In other words, the WTO will not disappear in a puff of smoke. However, if the WTO fails to keep abreast of the changes in the world and to evolve as an institution, some of the major users of the institution, and particularly some of the large trading powers, may begin to turn elsewhere to solve their problems. This could mean that these countries would turn to other multilateral institutions, such as the Organisation for Economic Co-operation and Development ("OECD"), or to regional organizations, bilateral measures, or even unilateral measures. If the major users become disillu-

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7. *See, e.g.*, Gary Horlick, *Reactions to Seattle*, 3 J. INT'L ECON. L. 162, 167 (2000) (discussing factors that contributed to the failure to launch a new round at Seattle); Joseph Kahn, *Swiss Forum Has Its Focus on Memories from Seattle*, N.Y. TIMES, Jan. 29, 2000, at C1 (stating that "government officials have stressed that the failure of trade talks owes more to negotiating positions taken by World Trade Organization members than to the influence of demonstrators"); Michael Littlejohns, *Embattled WTO Looks for Allies at the UN World Trade Body: Moore Says Public Confidence Must Be Rebuilt to Stem Threat to Economic Globalization*, FIN. TIMES, Jan. 20, 2000, at 10 (quoting WTO Director-General Mike Moore as stating that the NGOs and anti-trade groups at Seattle contributed but were not the ultimate causes of the failure).

8. *See, e.g.*, JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE (1998).

sioned, the WTO could gradually atrophy, which would then be disappointing to some of the other users of the system.

III. *THE CHARACTERISTICS NEEDED FOR WTO SUCCESS*

Given the need expressed above, what are the characteristics needed for a successful international cooperative institution (which might be the WTO)? I suggest these would include the following characteristics (but this list is certainly not exhaustive).

A. *Rule-Oriented System*

As indicated above, the cooperative mechanism must include a rule-oriented system with treaty rules that are reasonably effective. This is partly is because an international institution has a vague, very meager menu from which to draw governmental actions that can supply remedies to market failure. It is very unlikely that an international institution will have the power to tax, nor the wherewithal to subsidize. Likewise, its ability to rearrange market structures (such as tradable permits) is very limited. Thus, the focus for an international institution is generally on its potential role as "regulating" through the use of rules. However, the mere formulation of the rules is certainly not enough. The rules must be effective, reasonably efficient to implement, and creditable enough so that millions of market traders will build them into their strategic thinking about how to make important decisions for their businesses.

B. *Dispute Settlement Procedures*

The question begins to focus on the ability to have rules that will be effective, and this in turn, often boils down to a set of dispute settlement procedures. This is partly because the international institutions do not have the same sort of monopoly of power that national institutions often have and thus cannot truly "enforce" their rules using sanctions and force. Instead, international institutions depend much more on the persuasive effect of procedures and diplomacy. Countries obey rules partly because they feel an obligation to do so and because they want others to treat them similarly, etc. But for these techniques of "enforcement" to be successful, the institution and the rules must be creditable and deemed legitimate.

C. *International "Regulatory" Institutions*

In today's world, the importance of the international "regulatory" institution is much greater, since some of its decisions will have a clear and perceptible impact on the economic welfare of millions of individuals (including entrepreneurs) around the world. Another way of putting this is that the "stakeholders" in the international system are much more plentiful and much more diverse than has been the case in some circumstances of past diplomacy. In addition, due to the ease of travel and communication, the stakeholders find it much more feasible to organize their efforts to monitor and influence government decisions.

D. *Credibility and Legitimacy*

It is important that the procedures of the institution will lead to the enhancement of the critically needed characteristics of credibility and legitimacy. Some of these characteristics that are called for by the significance, plentitude, and variety of stakeholders, include transparency and participation. Often, the word *transparency* is used to include participation, but here I prefer to divide those two subjects and reserve for the word *transparency* the notion of receiving information, leaving for the word *participation* the notion of having an opportunity to make one's views heard by the decision-making processes.

E. *Transparency*

Modern communications techniques (e.g., the Internet and e-mail) have accentuated both the desire and the need for greater access to information for stakeholders. Citizens demand to have enough knowledge about how decisions are made so that they can judge for themselves whether the decisions are fair and based on appropriate and accurate factual information. They also wish to know almost instantly the full text and reasoning of decisions and what the influences on those decisions were. This is a critical "check and balance" on governments' misuse of power, but perfectly responsible government actions are also viewed with skepticism by many constituencies unless there is adequate information for the stakeholders to make judgements.

In the context of the WTO, this involves two separate categories of activities: diplomacy or rule-making activities and dis-

pute-settlement or *rule-applying* activities. In both respects, the WTO is coming under great criticism. Yet there are many governments (probably a majority of the members) who adamantly oppose improvement on this characteristic of the WTO. This opposition could be a recipe for disaster, or at least a recipe for decline of the institution, since it decreases the WTO's credibility and arouses suspicion.

It is interesting to this Observer to learn from some very experienced senior and now retired diplomats, their views that the WTO could indeed be considerably more transparent than it is. On the diplomacy side, some of the meetings of the WTO could be open to the public or at least to a press gallery. In some cases, even television would be appropriate.

With respect to the dispute settlement process, there has been much discussion about why the proceedings at the first level Panel and at the Appellate Body level could not be public, as many national proceedings and some other international proceedings are. Sometimes a criticism against this approach is made on the basis of misinformation about what is proposed. What is *not* proposed is opening the deliberations of the Panels and the Appellate Body to the public. Instead it is proposed only that the proceedings of advocacy by the disputing parties, third parties, etc., be open for viewing. In addition, there are strong feelings that the submittals from the governments, and possibly from other sources, should be public and available quite rapidly. Certainly, the resulting Panel report should be made public rapidly, so as to prevent "insider information" enabling strong critics of the decisions to make their cases in public while inhibiting responses from responsible participants. More study could be devoted to some of the pros and cons of this, including the legitimate worry on the part of some member countries that transparency could cause a certain tilt in the power structure of the organization as a whole.

F. *Participation*

It is more and more common now that national governments and many international organizations provide a degree (often constrained and limited, but nevertheless existing) of participation for stakeholders to make their views known. Sometimes this can be very useful, drawing attention to arguments or

even specific data that might otherwise not be readily available or within the resources of governments to collect for the dispute settlement proceedings. Again, the participation can be examined in connection with the diplomacy and rule-making process (but designed so as to avoid interference with the negotiating delicacies) on the one hand, and on the other hand, the dispute settlement process could utilize an "amicus brief" approach with appropriate constraints and rules to encourage participation.

Thus, important questions arise as to whether these characteristics are being developed and enhanced in the evolution of the WTO.

IV. *EMERGING PROBLEMS*

Mostly (but not entirely) as a result of the "consensus rule" of decision-making,[9] there appears to be considerable difficulty in the WTO decision-making processes. The world is no longer the same as it was even a decade or two ago, in the sense that economic developments (partly as a result of technology) are moving very fast. For the principal international organization for economic relations to be too often in an impasse situation is not healthy. Governments, entrepreneurs, and citizens are questioning whether the WTO has an effective "legislature" or "executive." If decision-making or rule-making processes are not working, this can have an important impact on the distribution of power within the organization. Currently we seem to have a very effective and relatively efficient judicial process (the dispute settlement process). It is certainly more effective than it was prior to the WTO. It has received a lot of credit, and, although it is not without some problems, it has been very worthwhile.

However, if the decision-making or rule-making processes fail to produce results, there is a tendency to throw issues at the dispute settlement system. Therefore, there could be a tendency to ask the dispute settlement process to take on issues that it ought not to. For instance, there could be temptations to put in the hands of the dispute settlement process issues that are really "rule-making" instead of "rule-applying."

There are real concerns about the current decision-making

9. *See* WTO Agreement art. IX.

structure. This structure developed in the Uruguay Round negotiations, when negotiations focused on a world trade organization, particularly in the fall of 1993 when major players worked hard to alter some of the previous drafts. While alterations were appropriate in many ways, one of the things that the negotiators did was to constrain and put checks and balances on the decision-making process. They did this by requiring decision by consensus, super-majorities, and other kinds of procedures. Today we realize that those constraints can lead to a lack of effectiveness of the decision-making process. This is one of the issues and one of the dilemmas that we have before us that requires more examination.

There are advantages and disadvantages to a consensus-based decision-making process. One downside of requiring full consensus is that it may be a recipe for impasse, stalemate, and paralysis. In other words, the result may be that things do not get done. We have seen some very interesting examples of that in the last year. There are also examples that often are not easily visible.

There are situations, for example, where the participants in this constitution would like to see evolution and change. These changes may be rather detailed and technical, such as modifying procedural elements of the Understanding on Rules and Procedures Governing the Settlement of Disputes[10] ("DSU"). Yet, proponents of change may abandon such an effort even before trying, because of their perception that the consensus process makes it impossible to do what they want to do.

What are some alternate methods for decisions? One possibility is to figure out a way to distinguish the more detailed procedural aspects from things that have real substance. There is already a distinction in the amending clause of the WTO between the non-substantive and the more substantive issues.[11] There might be ways to develop a similar distinction in the consensus process. Of course, one of the problems with the consensus process is that in order to change it you must have consensus. Therefore, any country can block a proposed change. This leads

10. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1226 (1994).

11. *See* WTO Agreement art. X.

us to search for alternative ways to make changes without amending either the DSU or the WTO as a whole. Often this is a delicate question, and I am not sure the alternatives are workable. If they are not workable, and the parties are without recourse to make changes, we are likely to be in very great trouble.

There, however, are some other possibilities. One possibility is a so-called "critical mass" idea, which has been experimented with. The basic idea is to develop a practice where countries refrain from blocking consensus when a critical mass of countries supports a proposed change. This critical mass of countries could be expressed as an overwhelming majority of countries and an overwhelming amount of the trade weight in the world, such as ninety percent of both of these factors. In addition, there could be other factors. Of course, the proposed change would need to be consistent with the existing treaty obligations, including most-favored nation[12] ("MFN"). One could try to develop a practice, maybe through something called "peer pressure," by encouraging states to refrain from blocking a consensus in certain kinds of decision-making, if these other attributes existed. One parallel or analog to this approach is roughly (but not precisely) the so-called Luxembourg Compromise in the history of the European Communities development.

Another possibility is to use expert or smaller groups attached to a particular committee, such as the Dispute Settlement Body. Such a group would meet with diplomats and perhaps outside experts to draft a proposal that coincided with criteria, such as those mentioned above. Then, when a proposed change is put forward to the final decision-makers, the parties could argue that governments should refrain from blocking the consensus in that particular circumstance because of the critical mass argument, the percentage-of-trade, and so forth.

A third approach is to use a "tariff scheduling" approach. This approach was used in the telecommunications agreement[13] and, to some extent, the financial services agreement.[14] Under

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12. *See* General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, pt. II, art. II, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1169 (1994) [hereinafter GATS].

13. *See* Annex on Telecommunications, Apr. 15, 1994, GATS, Annex, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 28, 33 I.L.M. 1192 (1994).

14. *See* Annex on Financial Services, Apr. 15, 1994, GATS, Annex, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 28, 33 I.L.M. 1189 (1994).

this approach, commitments resulting from further negotiations were put in the schedules (which are annexed to the General Agreement on Trade in Services) and apply to those governments that were willing to go along with the measure. Of course, these commitments are usually subject to MFN, depending on some of the aspects of the Services Agreement. This approach addresses both the difficulties with the consensus rule and the "single package" idea. It is analogous to something that was built into the WTO, namely, the Plurilateral Trade Agreements,[15] which are optional.

Unfortunately, it takes a full consensus to add an agreement to Annex 4, so there could well be blocking against that approach. But if there were not blocking, this also might be an approach where certain innovation could occur with smaller groupings than the whole.

CONCLUSION

The WTO is currently our most important international institution for assisting markets, now very globalized, to work. Yet the flaws in the WTO, unless addressed and hopefully moderated, will cause increasing damage to that institution, particularly its critically important characteristics of credibility and legitimacy. This could result in increasing problems for the working of markets in our globalized world. Let us hope these trends can be reversed.

15. *See* Plurilateral Trade Agreements, Apr. 15, 1994, WTO Agreement, Annex 4, *at* http://www.wto.org/english/docs_e/legal_e/final_e.htm.